Supreme Court, U.S.
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No. 00-966

IN THE

Supreme Court of the United States

SAJID L. SYED,

Petitioner,

v.

HERCULES INCORPORATED, a Delaware Corporation; HERCULES INCORPORATED INCOME PROTECTION PLAN, an employee welfare benefit plan; and HERCULES INCORPORATED, Plan Administrator of DISABILITY PLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should exercise its discretion to review this case when the sole issue presented is whether the Third Circuit Court of Appeals erred in determining the Delaware statute of limitations applicable to a claim for benefits under an employee disability plan.

(Negative answer sought by Respondents).

2. Whether the Court should exercise its discretion to review this case when many of the arguments set forth in the Petition were not raised in the lower courts and contradict the arguments advanced by Petitioner in the lower courts.

(Negative answer sought by Respondents).

3. Whether the Court should exercise its discretion to review this case when the same arguments raised in the Petition were raised in Petitioner's recently-filed Rule 60(b) Motion in the United States District Court for the District of Delaware and Emergency Motion to Withdraw the Mandate in the Third Circuit Court of Appeals, which motions are still pending.

(Negative answer sought by Respondents).

STATEMENT PURSUANT TO RULE 29.6

Respondent Hercules Incorporated ("Hercules") states that it does not have a parent corporation, and that no publicly held company owns ten percent (10%) or more of its stock.

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COUNTERSTATEMENT OF THE CASE

In February 1996, Petitioner Sajid L. Syed filed a complaint in the United States District Court for the District of Delaware seeking disability benefits under the Hercules Incorporated Income Protection Plan (the "Plan") relating to an injury that he allegedly suffered on January 31, 1992. On May 27, 1999, the Delaware District Court issued a Memorandum Opinion holding that Petitioner's disability claim was barred by Delaware's statute of limitations applicable to claims for employee benefits. (Petition, at 29a-46a).[1] Pursuant to a Memorandum Order dated July 14, 1999, Petitioner's Motion for Reconsideration, Clarification and Reargument of the statute of limitations determination was denied by the Delaware District Court. (*Id.* at 47a-50a).

Petitioner appealed the Delaware District Court's decision to the Third Circuit Court of Appeals. On May 30, 2000, following briefing and oral argument, the Third Circuit issued an opinion rejecting each of Petitioner's arguments and affirming the Delaware District Court's Opinion. (Petition, at 1a-26a). By Order dated July 10, 2000 (*Id.* at 27a-28a), Appellant's Petition for Panel Rehearing and Rehearing En Banc was denied by the Third Circuit.

The sole issue presented in the Petition is whether the Third Circuit applied the appropriate Delaware statute of limitations to Petitioner's claim for disability benefits.

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1. The District Court also granted summary judgment for Respondents as to certain other claims made by Petitioner, and granted summary judgment to Respondents on their counterclaim for reimbursement of certain overpayments made to Petitioner. These determinations were affirmed by the Third Circuit, and Petitioner has not requested review of these determinations in this Court.

Petitioner's Statement of the Case (Petition, at 2-5) contains a misleading and often inaccurate recitation of select "facts", which, for the most part, are wholly irrelevant to the discrete issue presented.

The bulk of Petitioner's Statement of the Case is directed toward his contention that the Third Circuit focused on the wrong Plan Document. Specifically, Petitioner now contends that the Benefits Portfolio attached to the affidavit of Patrick Donahue dated August 26, 1994 (the "Benefits Portfolio"), rather than the Hercules Summary Plan Description (the "Hercules SPD"), was the correct Plan Document. (Petition, at 3-5, 17-18). This argument is plainly irrelevant, as the Third Circuit did not base its statute of limitations determination on the language of the Plan Document. Moreover, as the Third Circuit specifically held (and as Petitioner does not dispute), there are no material differences that are relevant to the Petitioner's claims between the purported Plan Documents offered by Petitioner and Respondents. (*Id.* at 13a). Thus, no matter which document the Third Circuit concluded was the Plan Document the result would be the same.

Putting aside the irrelevancy of Petitioner's argument, his belated assertion that Respondents provided the wrong Plan Document to the courts below both contradicts his position in the District Court and is incorrect. As Petitioner concedes, his own counsel included the Hercules SPD in the summary judgment briefing and admitted that Petitioner timely received that document. Petitioner now seeks to disavow that admission by claiming that his attorney "made a mistake." (Petition, at 4). Petitioner's transparent attempt to change the facts in the face of the adverse decisions by the District Court and the Third Circuit should be rejected.

Equally frivolous is Petitioner's assertion that Respondents "concealed" the Benefits Portfolio from the Third Circuit. (*Id.*) It is undisputed that the Benefits Portfolio was presented to both the Delaware District Court and the Third Circuit. In neither court, however, did Petitioner assert (as he now contends in this Court) that the Benefits Portfolio was the Plan Document. Petitioner's attempt to raise this argument for the first time in this Court is improper.

Ultimately, the record demonstrates that Petitioner's claims were fairly presented to and correctly decided by the Third Circuit. Petitioner's assertion that the Third Circuit erred is based largely on facts and legal arguments not even presented to that Court. Petitioner's strategy is obvious: having exhaustively litigated his claims in both the Delaware District Court and the Third Circuit, and having lost at each turn, Petitioner has dismissed his counsel and seeks to change the facts and raise new legal arguments simultaneously in the Delaware District Court, the Third Circuit, and this Court.[2] Such conduct should not be tolerated by this Court, and Petitioner's new arguments should be disregarded altogether as untimely raised. Further, for the reasons set forth herein, none of Petitioner's arguments amount to anything near the sort of "compelling reasons" that warrant review by this Court and, in any event, the arguments are legally incorrect.

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2. As noted in Section III herein, Petitioner has filed motions that remain pending in both the Delaware District Court and the Third Circuit seeking to raise essentially the same arguments that he asserts in his Petition in this Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO REVIEW WHETHER THE THIRD CIRCUIT SELECTED THE APPROPRIATE DELAWARE STATUTE OF LIMITATIONS.

The sole question presented by the Petition is whether the Third Circuit applied the appropriate statute of limitations under Delaware law. On its face, the Petition fails to establish any compelling reason consistent with Supreme Court Rule 10 why the decision of the Third Circuit merits the attention of this Court. Clearly, no "important federal question" was implicated by the Third Circuit's holding as to the applicable Delaware statute of limitations. Nor is the Third Circuit's decision in conflict with any decision by another United States court of appeals, as no other circuit court has addressed the discrete issue of the appropriate Delaware statute of limitations applicable to a claim for benefits under an ERISA disability plan.

In essence, Petitioner asserts that the Third Circuit erred in determining the applicable Delaware statute of limitations based on the relevant facts. This alleged error falls squarely within Rule 10's admonition that:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Therefore, the Petition should be denied.

Recognizing that his legal arguments are untenable and do not warrant any further review, Petitioner attempts to disguise them with frivolous allegations of fraud, and by fabricating purported conflicts between the Circuit Courts where none exist. As explained below, each of Petitioner's arguments are without merit.

A. The Third Circuit's Decision To Apply The Appropriate Delaware Statute Of Limitations To Petitioner's Claim Was Correct, And Created No Conflict Among The Circuits.

Petitioner first argues that the Third Circuit erred by determining and then applying the applicable Delaware statute of limitations, rather than focusing solely on the purported limitations period set forth in the Plan Document. (Petition, at 5-6). This argument is meritless. It is well-settled that where, as here, the ERISA statute "does not provide a statute of limitations . . . the Court should borrow the local time limitation most analogous to the case at hand." *Rich v. Zeneca, Inc.*, 845 F. Supp. 162, 164 (D. Del. 1994) (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)). Indeed, in both the Third Circuit and the Delaware District Court, Petitioner conceded that the Court was required to apply the most analogous Delaware statute of limitations and argued that Delaware's three-year contract statute of limitations (10 *Del. C.* § 8106) should apply. As explained in Section I.B below, the lower courts considered and properly rejected the latter argument.

Petitioner next argues that the purported limitations period found in the Plan Document trumps the applicable Delaware statute because he allegedly relied on the Plan provision in electing to delay the filing of his complaint.

(Petition, at 6). Petitioner's "reliance" argument is belied by the fact that Petitioner never even raised the Plan language in the summary judgment briefing. Certainly, if Petitioner relied on this language, he would have raised it in response to Respondent's request for summary judgment on statute of limitation grounds. As such, Petitioner's contrived assertion that Respondents misled him and thereby breached their fiduciary duties is shown by the record to be untrue. Nor should Petitioner be permitted to raise this "breach of fiduciary duty" argument for the first time on appeal. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts") (citations omitted).

In any event, as the District Court held in response to Petitioner's Motion for Reconsideration, Petitioner's belated assertion that the Plan Document extends the statute of limitations fails as a matter of Delaware law. (Petition, at 49a). Even if the Plan Document could be construed to provide for a three year statute of limitations, *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384, 386-87 (Del. Super. 1978), upon which Petitioner himself relied in the lower courts, specifically states that "a contractual period of limitations which attempts to lengthen or extend the period otherwise contained in a statute violates . . . public policy" and is invalid (footnote omitted). Therefore, Petitioner may not rely on the Plan to extend the applicable statute of limitations. Petitioner conveniently ignores this established principle of Delaware law.

Petitioner also suggests that the Third Circuit's decision is in "conflict with other Circuits on important federal issues which require uniformity nationwide." (Petition, at 5). Not surprisingly, Petitioner fails to explain how the decision,

which simply held that Delaware's one-year employee benefit statute of limitations applied to a claim under an employee disability plan, conflicts with the decision of any other Circuit Court. Indeed, Respondents' counsel are unaware of any other Circuit Court that has addressed this issue, and Petitioner has cited none. Moreover, the Third Circuit noted specifically in its opinion the limited scope of its ruling, stating that "we express no view regarding the statute of limitations that would apply if a claim such as Syed's were brought in [another state]." (Petition, at 12a n.6).

Further, the Third Circuit's reasoning is consistent with the approach taken in the decisions from other circuits cited in its opinion (Petition, at 5a) and in the Petition (*Id.* at 11). Based on a review of the specific state statutes (in states other than Delaware), those cases adopted as the most analogous state statute of limitations for an action under ERISA § 502(a)(1)(B) the statute of limitations for a contract action. Where (as in one of the cited cases and in the present case) there are two potentially applicable statutes of limitations — one that applies to contracts generally and one that applies specifically to employee benefit claims — the more specific statute governs. *See Adamson v. Armco, Inc.*, 44 F.3d 650, 652-53 (8th Cir. 1995) (faced with choosing between a six-year Minnesota statute of limitations for contract actions generally, and a more specific two-year statute of limitation for wage claims, the Eighth Circuit chose the more specific wage claim statute). Thus, Petitioner's attempt to create a conflict among circuits where none exists is without any basis, and clearly does not warrant review by this Court.

B. The Selection By The Third Circuit Of 10 *Del. C.* § 8111 As The Most Analogous Delaware Statute For A Claim Under ERISA § 502(a)(1)(B) Was Legally Correct.

The Third Circuit's analysis of the Delaware statutes of limitations and relevant Delaware case law was legally correct. Although Delaware has a general statute of limitations for contract actions (10 *Del. C.* § 8106), another statute of limitations (10 *Del. C.* § 8111) more specifically applies to the type of employment benefits claim asserted here under ERISA § 502(a)(1)(B). That more specific Delaware statute of limitations squarely covers Petitioner's action "for recovery upon a claim . . . for any . . . benefits arising from . . . work, labor or personal services performed . . ." 10 *Del. C.* § 8111 (Petition, at 77a). For that reason, the argument advanced in the dissenting opinion below and by Petitioner here (that Petitioner's claim is more analogous to an ordinary contract claim) "is simply not true," and was correctly rejected by the Third Circuit majority. (*See* Petition, at 11a).[3]

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3. Petitioner seeks also to argue for the first time in this Court that yet another Delaware statute of limitations, one governing workers compensation claims, is "most analogous." (Petition, at 14-15 (citing 19 *Del. C.* § 2361)). This argument comes too late and in all events is clearly wrong because Petitioner is not seeking workers compensation benefits, and this case involves neither "an agreement approved by the [Delaware Industrial Accident] Board" nor "an award of the Board." *See Id.* Petitioner's half-hearted further assertion (Petition, at 13) that Delaware's two-year statute of limitations for personal injuries applies likewise is made for the first time in this Court and should be disregarded as untimely, as well as legally erroneous. *See Mitchell v. E.I. duPont de Nemours & Co.*, 310 A.2d 641, 642 (Del. Supr. 1973).

In the only Delaware case directly addressing this issue, the Delaware Supreme Court held that a claim for benefits under a disability plan is subject to this one-year statute of limitations. *Mitchell*, 310 A.2d at 642 (citing then 10 *Del. C.* § 8110, now 10 *Del. C.* § 8111). In particular, 10 *Del. C.* § 8111 imposes a one-year statute of limitations on all claims for "benefits arising from" the employment relationship.[4] The Delaware District Court recognized long prior to the present case that Section 8111 has a "comprehensive sweep," stating that:

> It was intended to bar all claims arising out of the employer-employee relationship. The Act bars claims for "wages", "salary", and it likewise applies to "overtime" and to any other "benefits" arising from the corporate-officer employment relationship. The word "benefits" is embracing and covers all advantages growing out of the employment.

Sorensen v. Overland Corp., 142 F. Supp. 354, 360 (D. Del. 1956), *aff'd*, 242 F.2d 70 (3d Cir. 1957). *See also Rich*, 845 F. Supp. at 165 (citing a "series of decisions where Delaware courts have applied the one year statute to claims for employment related benefits") (citations omitted).[5]

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4. Petitioner states that he was not an employee when his disability benefits were terminated. (Petition, at 13). Nothing in Section 8111, however, requires that a party still be employed when the claim for benefits "arising from" his prior employment is asserted.

5. The Plan, in which Petitioner was enrolled upon commencing his employment with Hercules, is clearly a "benefit" arising from his employment. *See Mitchell*, 310 A.2d at 642 (holding that disability plan is a " 'fringe benefit' which accrued to the employee by reason of tenure for a period of one year").

Petitioner does not dispute the Delaware Supreme Court's holding in *Mitchell* or suggest that Delaware law has changed. Rather, he erroneously asserts that the District Court should not have relied on *Mitchell* because it was decided before ERISA became effective. As Petitioner must concede, however, ERISA does not contain a statute of limitations and, therefore, the Court must look to Delaware law to determine the applicable statute of limitations. (Petition, at 10). Thus, the enactment of ERISA did not change Delaware law with regard to the statute of limitations. Indeed, Petitioner offers no reason why a claim under an ERISA disability plan should be treated any differently then a claim under a non-ERISA disability plan for statute of limitations purposes.

Because he cannot distinguish *Mitchell*, Petitioner suggests that this Court should simply ignore that decision by Delaware's highest court and, instead, rely on the Delaware Superior Court's decision in *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384 (Del. Super., 1978). Petitioner, however, cannot simply disregard the controlling decision of the Delaware Supreme Court. Moreover, *Shaw* involved a claim under a "Voluntary Group Accident Insurance Policy" — not a disability plan. *Shaw*, 395 A.2d at 385. Petitioner likewise ignores the fact that *Shaw* involved a "direct purchase" of an insurance contract. Thus, *Shaw* is inapposite and provides no support for Syed's arguments.[6]

Petitioner also relies on a one-page District Court Order dated March 29, 1995, which he never cited in the District Court during summary judgment briefing or in the Third

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6. Although Petitioner makes much of the fact that *Shaw* was decided post-ERISA, he must concede that *Shaw* did not involve an ERISA plan. (*See* Petition, at 13)

Circuit on appeal. *See Loving v. Pirelli Cable Corp.*, C.A. No. 94-205-RRM (D. Del. Mar. 29, 1995) (ORDER) (hereinafter, the "*Loving* Order").[7] The *Loving* Order, which was entered **four** years before the District Court's grant of summary judgment in this case, contains absolutely no legal analysis relating to the statute of limitations issue, and provides no basis for granting review here. Certainly, a party should not be able to obtain review by this Court based on the assertion that the party, represented by counsel, failed for whatever reason to cite a potentially relevant case. This is especially true here given that Petitioner has conceded that **his own counsel** represented the plaintiff in the *Loving* case, but elected as a strategic matter not to cite the *Loving* Order in the present case. The reason for that election is obvious: the *Loving* Order provides no support for Petitioner's position.[8]

Finally, Petitioner relies on a number of cases involving claims for wrongful discharge. (Petition, at 17-18 (citing cases)). Claims for wrongful termination are fundamentally different than claims for benefits under a disability plan, and are subject to a different Delaware statute of limitations.

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7. Petitioner does not include a copy of the *Loving* order in his appendix, perhaps because he recognizes the absence of any analysis therein to support his argument.

8. Petitioner suggests erroneously that the *Loving* Order was affirmed by the Third Circuit and, therefore, it should have been considered in this case. (Petition, at 11). The Third Circuit Order cited by Petitioner (*Id.*), however, did not affirm the March 29, 1995 *Loving* Order on which Petitioner relies. It affirmed a judgment entered on October 18, 1995 (*Id.*), which is not even in the record.

See Rich, 845 F. Supp. at 166. As such, the cases Petitioner cites are inapposite.

C. Petitioner's "Fraud On The Courts" Argument Is Meritless.

Petitioner's "fraud on the courts" argument is based solely on his assertion that Respondents provided the wrong Plan Document to the Delaware District Court and the Third Circuit. Petitioner apparently now contends that the Benefits Portfolio, rather than the Hercules SPD, was the correct Plan Document. (Petition, at 17-18). This belated argument is meritless and disingenuous.

First, Petitioner's claim of "fraud" is contrary to the record. It is undisputed that the Hercules SPD, which Petitioner now suggests **Respondents** fraudulently submitted to the lower courts, was in fact submitted by **Petitioner's** own counsel. (Petition, at 4). Having fired his counsel, Petitioner now asserts that his "attorney made a mistake and attached a copy of [the] wrong SPD." (*Id.*) In fact, the record establishes that Petitioner's attorney did not make a "mistake," but rather that Petitioner has now decided to advance an entirely new legal argument. Petitioner was aware of the Benefits Portfolio at all relevant times, and included it in his submissions to the Delaware District Court and the Third Circuit. (*See, e.g.*, Petition, at 3-5). Although aware of the Benefits Portfolio, Petitioner did not assert (as he does now) that it was the Plan Document, but instead argued that the insurance policy relating to the Plan (the "Insurance Policy") was the Plan Document. (*Id.* at 43a). It would turn the legal system on its head if Petitioner could now (with the benefit of hindsight and faced with an adverse decision)

contend that the legal arguments advanced by his counsel were "mistakes" and seek to reverse the decisions below based on "new" arguments.

Second, Petitioner's belated assertion that the Hercules SPD, which his own counsel presented to the Delaware District Court, is not the correct SPD is demonstrably false. It is undisputed that Petitioner's claim for disability benefits was evaluated pursuant to the terms of the Hercules SPD. Indeed, as the Third Circuit recognized, the claim denial letters sent to Petitioner in 1994 specifically quoted sections of the Hercules SPD. (Petition, at 13a). Thus, Petitioner's suggestion that Respondents "switched" the Plan Document after the 1996 *Ramsey* decision is patently frivolous. (*Id.* at 19). Moreover, it is undisputed that (in 1994) Petitioner addressed each of his claim appeal letters to Provident Life and Accident Insurance Company, the claims fiduciary referenced in the Hercules SPD. This fact contradicts Petitioner's new argument that from 1992 through 1995, Respondents provided Petitioner only with copies of the Benefits Portfolio, which referenced John Hancock Mutual Life Insurance Company, rather than Provident Life, as the entity charged with handling claims. (*Id.* at 4).

Third, in addition to being incorrect, Petitioner's argument concerning the identity of the correct Plan Document is much ado about nothing. Petitioner cannot and does not assert that the result would be any different if this Court concluded that the Benefits Portfolio, rather than the Hercules SPD, was the correct Plan Document. In either case, Petitioner's claim is barred by the statute of limitations. Indeed, Petitioner concedes that the only potentially relevant difference between the documents is in the wording (albeit

not in the meaning) of the definition of total disability. (Petition, at 19-20). The Third Circuit's determination that Petitioner's disability claim was barred by the Delaware statute of limitations was not based on the definition of total disability.

D. Summary Judgment Was Entered Properly On Petitioner's § 502(c) Claim Because There Was No Dispute As To Any Fact That Is Material To Such Claim.

As noted previously (Section I.C. *supra*), Petitioner based his ERISA § 502(c) claim in the lower courts upon his contention that the Hercules SPD, which Petitioner initially conceded that he timely received from Respondents, was not the Plan Document to which he was entitled. Petitioner asserted that he should have been provided with a copy of the Insurance Policy. Both the Delaware District Court and the Third Circuit rejected Petitioner's Section 502(c) claim, because the two documents "are identical in all respects material to this dispute," and "[Petitioner] has failed to demonstrate that he suffered any prejudice as a result of the [Respondents'] alleged failure to produce the appropriate document." (Petition, at 13a, 44a n.11).

Now, having repeatedly lost his Section 502(c) argument, Petitioner seeks to resuscitate his claim by advancing a new argument. Specifically, Petitioner now contends that Respondents should have given him a copy of the Benefits Portfolio, rather than the Hercules SPD. This belated factual argument is not only meritless and disingenuous (*see* Section I.C, *supra*), it is not material, and

therefore, summary judgment was granted correctly in favor of Respondents on Petitioner's 502(c) claim.[9]

Significantly, Petitioner does not even attempt to assert that the result of his request for disability benefits would have been any different if the District Court had concluded that the Benefits Portfolio, rather than the Hercules SPD or the Insurance Policy, was the correct Plan Document. Nor could he do so. As the Delaware District Court stated in rejecting Petitioner's argument that his claim should have been evaluated under the Insurance Policy, rather than the Hercules SPD:

> The Plaintiff's argument is to no avail because the definition of "total disability" set forth in the Insurance Policy and that set forth in the SPD/ Plan Document for participants who have received 24 months of benefits are identical. Both provide that an individual *is totally disabled if he or she is not able to work at any job for gain or profit*

9. Summary judgment must be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). If the party moving meets its initial burden of identifying those portions of the materials on file that demonstrate the absence of any genuine issues of material fact, the burden then shifts to the non-moving party to demonstrate, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient. There must be evidence on which the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

> *for which he or she is fitted by education, training, or experience.*

(Petition, at 37a) (emphasis added). The Benefits Portfolio, which Petitioner now asserts is the Plan Document, sets forth substantially the same definition of total disability:

> After receiving 24 monthly payments you *are considered totally disabled for a[s] long as you are prevented from performing any employment for wage or profit for which you are reasonably qualified by training, education, or experience.*

Petition, at 20 (emphasis added). As a result, it is immaterial which of the three purported Plan Documents Respondents provided to Petitioner, because they all contain the same standard for evaluating his claim for total disability benefits. Therefore, the lower courts properly upheld summary judgment in favor of Respondents on Petitioner's Section 502(c) claim.

E. The Third Circuit Did Not Ignore The Insurance Policy.

Petitioner asserts that the Third Circuit erred by not concluding that the Insurance Policy was the Plan Document. (Petition, at 25-28). Of course, this argument is impossible to reconcile with Petitioner's argument that the Benefits Portfolio was the Plan Document, and that Respondents committed fraud by suggesting otherwise. (*See* Sections I.C. and I.D. above).

Putting aside the patent inconsistency in Petitioner's arguments, it is clear that this particular argument also is

irrelevant. Regardless of which document the Third Circuit concluded was the Plan Document, Petitioner's claim for disability benefits is still barred by the statute of limitations.

Moreover, the Third Circuit did not ignore the Insurance Policy. To the contrary, both the District Court and the Third Circuit considered Petitioner's claim that the Insurance Policy, rather than the Hercules SPD, was the Plan Document and concluded that there were "no material differences between the two documents." (Petition, at 13a). In fact, the Third Circuit held that "the [Hercules] SPD and the [Insurance Policy] are identical in all respects material to this dispute. . . ." (*Id.*) As such, even if the lower courts determined that the Insurance Policy was the Plan Document, the result would be the same.

F. Petitioner's "Due Process" Claim Is Frivolous.

Having repeatedly presented to the lower courts his discredited assertion that Respondents should have provided him with a copy of the Insurance Policy, instead of the SPD, Petitioner makes the remarkable claim that "his constitutional rights under [the] Fifth Amendment and 42 U.S.C. § 1983 have been violated because [the] Third Circuit and the District Court did not pay any attention to his contentions." (Petition, at 29 (citations omitted)). For all of the reasons set forth in the previous sections of this brief, it is apparent that Petitioner received more than "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " (*Id.* (citation omitted)). Therefore, Petitioner's "due process" and Section 1983 claims are without any merit.

II. THE PETITION SHOULD BE DENIED BECAUSE MANY OF THE ARGUMENTS ADVANCED BY PETITIONER WERE NOT PRESENTED BELOW.

In addition to its many other fatal shortcomings discussed in Section I above, the Petition should be denied because most of the arguments advanced therein were not even presented to the Third Circuit or the District Court. For example, Petitioner now asserts that the Benefits Portfolio is the Plan Document. (Petition, at 3-5). Yet, in both the Third Circuit and the Delaware District Court, Petitioner asserted that the Insurance Policy was the Plan Document. (*Id.* at 13a, 43a). Petitioner also asserted in the Third Circuit and the Delaware District Court that Delaware's three-year contract statute of limitations (10 *Del. C.* § 8106) was the most analogous statute. Yet, Petitioner now asserts in this Court that Delaware's workers compensation or personal injury statute of limitations are the most analogous. (Petition, at 13-15). Petitioner's attempt to advance new (and contradictory) arguments in this Court is improper and independently warrants denial of the Petition. *See, e.g.*, *Taylor*, 503 U.S. at 645-46 ("ordinarily, this Court does not decide questions not raised or resolved in the lower courts") (citations omitted).

Similarly, Petitioner did not raise in the Third Circuit his arguments relating to: (i) Due Process; (ii) an alleged breach of fiduciary duty by Respondents; (iii) fraud on the Courts; and (iv) 29 U.S.C. §§ 1021(a), 1022(b) & 1104(a). Certainly, a Petition for Writ of Certiorari in the United States Supreme Court is not the appropriate time to first present these arguments. Therefore, the Petition should be denied due to the Petitioner's failure to present arguments first to the courts below.

III. THE PETITION SHOULD BE DENIED BECAUSE MANY OF THE ARGUMENTS NOW ADVANCED BY PETITIONER WERE RECENTLY PRESENTED BY MOTIONS FILED IN THE LOWER COURTS, WHICH MOTIONS HAVE NOT YET BEEN DECIDED.

Prior to filing his Petition in this Court, Petitioner filed: (i) a Rule 60(b) Motion in the Delaware District Court; and (ii) an Emergency Motion to Withdraw the Mandate in the Third Circuit. Petitioner inexplicably fails to mention those motions in his Petition, although they are still pending in the respective lower courts. Many of the grounds asserted in both motions are essentially the same as those now offered in this Court to support the Petition. Respondents have replied to both motions by contending that they should be denied, *inter alia*, because Petitioner has had his day in court, and seeks too late to raise new arguments and reassert old ones. Nevertheless, having filed those motions, Petitioner has proffered no reason why, as a matter of procedure, this Court should grant a writ of certiorari in order to consider and decide legal issues before they have been addressed by the Third Circuit and the Delaware District Court. Moreover, by filing the motions in the lower courts, Petitioner has acknowledged implicitly at least that his new arguments should be presented (if ever) first in the lower courts, rather than in this Court through a Petition for Writ of Certiorari. For this additional reason, the Petition should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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